NOTES.

THE PRESENT STATUS OF RIGHTS TO INTERSTATE STREAMS.

THE bringing of suit in the Supreme Court of the United States by the state of Kansas against the state of Colorado, to restrain the latter state from diverting or allowing the diversion of the Arkansas river, has attracted considerable attention to rights to interstate streams. The subject is of interest, not to lawyers alone, but to all who for any reason are interested in the industrial life of the West, since that life depends very largely upon the use made of the streams. Few who have not had their attention especially called to the matter realize how large a percentage of the streams of the arid region are interstate in character. To enumerate those which are would be too large a task, while the exceptions make but a short list. The tributaries of the Great Salt Lake, except Bear river, are entirely within the state of Utah ; The Humboldt river is entirely in Nevada ; the Salt and Gila rivers lie practically within the territory of Arizona; and the Pacific coast states contain a large number of streams which are wholly within a single state. Outside of the streams referred to, the entire water supply of the arid West will be affected by the policy adopted regarding rights to interstate streams. The future tense is used in the last sentence for the reason that as yet the subject has received little attention, and no case directly involving the question has been decided by the United States Supreme Court. The reason that so important a subject has received so little attention is a perfectly natural one. The whole body of laws and customs governing irrigation has been a growth from small, isolated beginnings, and the laws enacted have been attempts to give legal sanction to existing practices or to harmonize existing conditions rather than rules laid down for the control of future development. When irrigation began there were no laws regarding the rights to water from streams. Every farmer took what he wanted, and in doing so interfered with no one. As this process continued, a stage was reached where further diversions took water away from those previously using it. This led to the adoption of laws declaring that the first user was first entitled to supply his wants, and after him the second,

and after him the third — "first in time, first in right" was the rule. Utah began by giving the county courts control of water privileges, and for thirty years made no provision for protecting water users in one county from those taking water from the same stream in a county above. At the end of that time provision was made for inter-county boards to control entire streams. Colorado, in providing for protecting rights to streams, divided her territory into water districts, the size of which was regulated by the amount of work necessary, on the part of the water commissioner, in dividing the water among those entitled to it. On a single stream there are several districts one above the other. At first the rights in each of these districts were adjudicated and administered entirely independent of rights in the districts above and below. It was soon found, however, that the water was being taken away from farmers in the lower districts by later comers in the upper districts. This led to treating a whole stream and its tributaries, so far as they are in Colorado, as a unit, and making rights in one district on a stream subject to prior rights in another. This has answered the needs of Colorado, but the time has now come when there is a demand for protection for farmers in Kansas, Nebraska, Wyoming, and New Mexico from those who would use the water in Colorado. The question of the relation of the rights in one state to those in another has not received judicial attention until recently, because development had not proceeded so far that the use in one state interfered with that in another. It follows that any further development will make the settlement of this question of more and more importance. This paper, as its title implies, discusses the present status of rights to these streams, rather than what is likely to be, or what ought to be.

The general rule governing rights to water in the arid states is stated by Judge Knowles of the United States circuit court for the district of Montana, as follows:

> It is a recognized rule of law that a person who has appropriated water at a certain point in a stream is entitled to have so much of the waters of said stream as he appropriated flow down to him to the point of his diversion.[1]

It has been held repeatedly that this right is not based on state laws. In Hoffman *v.* Stone (*7 Cal.*, 47, 48) the supreme court of California said:

> The former decisions of this court in cases involving the right of parties to appropriate waters for mining and other purposes, have been based upon the wants of the community, and the peculiar condition of things in the state, rather than any absolute rule of law governing such cases.

[1] Howell *v.* Johnson, *89 Fed. Rep.*, 556.

In a more recent case (Lux *v.* Hagin, *69 Cal.*, 255) the same court said:

From a very early day the courts of this state have considered the United States government as the owner of running waters on the public lands of the United States, and of their beds. Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the state courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator on the theory that the appropriation was *allowed* or *licensed* by the United States.

The question of the basis of the right of appropriation was raised in the case of Howell *v.* Johnson, above referred to. The case is so clearly and briefly stated by the court that his statement is quoted below:

The plaintiff is a citizen of the state of Wyoming. The defendants are all citizens of the state of Montana. In his bill of complaint the plaintiff sets forth that he is the owner of certain lands in the state of Wyoming, and that, for the purpose of irrigating the same, he appropriated certain waters of a a creek called "Sage Creek." This creek has its source in Montana, and flows for some distance within its boundaries before it enters the state of Wyoming. Plaintiff's ditch and point of diversion of said waters are both within the last-named state. Defendants settled along the line of said creek, in Montana, subsequent to the appropriation of plaintiff, and in said state have diverted, it is alleged, the waters of said creek, and prevented the same from flowing down to plaintiff's ditch and land. Plaintiff has sued defendants in this court, and asks to have them enjoined from so diverting said waters. Defendants have filed a demurrer to this bill.

The points presented in this demurrer are that plaintiff, having a water right acquired under and by virtue of the laws of Wyoming, cannot come into this court to enforce the same. It is also claimed that the rights pertaining to this water are under the control of the legislative power of Montana.

Considering the first point, it is urged that the right of plaintiff, being acquired under and by virtue of the laws of the state of Wyoming, can be enforced only as to citizens of Wyoming, and not against citizens of Montana, who have diverted water only in Montana. Is the right claimed by plaintiff one which accrues only by virtue of the laws of Wyoming? Plaintiff alleges that he made his appropriation of the waters of said creek in accordance with the laws of Wyoming and Montana. Allowing that there could be no appropriation of the waters of said creek made in Wyoming under and by virtue of the laws of Montana, still the allegation that the appropriation was made under the laws of Wyoming remains. According to the bill plaintiff's appro-

priation was made on the 1st day of August, 1890. At that date sections 2339 and 2340 of the *Revised Statutes* were in force. They provided:

"Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section."

In the case of Basey *v.* Gallagher (*20 Wall.*, 670), the Supreme Court said in regard to this act: "The act of Congress of 1866 recognized the right to water by prior appropriation for agricultural and manufacturing purposes as well as mining;" and also decided that if the right to appropriate water for any of the purposes named was recognized by either local customs, or by the legislation of any state or territory, or by the decisions of the court, it would be sufficient. The allegation in the bill that the water was appropriated under the laws of the state of Wyoming would meet the requirements of the said act of Congress. Up to the passage of the said act of 1866, the right of the prior appropriator to use water, for any of the purposes above named, had, in the arid and mining regions of the West, been recognized as against any other person, claiming the same, but not as against the national government. This act, coupled with the act of July 9, 1870, embodied in said section 2340, recognized the right of the prior appropriator of water upon the public domain, even as against the United States and its grantees, if said appropriation was authorized by the statute of the state where the appropriation was made. (Black's *Pom. Water Rights*, No. 25; Osgood *v.* Mining Co., *56 Cal.*, 571.) The rights of the plaintiff do not, therefore, rest upon the laws of Wyoming, but upon the laws of Congress.

The legislative enactment of Wyoming was only a condition which brought the law of Congress into force.

From the above decisions the principle seems settled that the rights acquired by appropriation do not have their origin in state legislation, and will, therefore, be protected regardless of state lines.

Assuming this to be true, the practical question of the methods of determining and enforcing these rights arises. So far as the writer is able to discover, but three cases involving the question of jurisdiction

over such rights have been decided by courts of last resort. The first of these was the case above cited at length — Howell *v.* Johnson. This suit was brought in the United States circuit court, and, as seen, the court upheld its own jurisdiction.

The second case came before the supreme court of Colorado.[1] This case was one in which the lower Colorado court, in adjudicating the rights to a stream flowing from Colorado into New Mexico, refused to recognize the right of a ditch diverting water to be used in New Mexico, on account of lack of jurisdiction. This decision was confirmed by the supreme court, which said, however, that in taking that position it did not decide the question as to whether water can be diverted in Colorado for use in New Mexico. What was decided was that "from these enactments (the laws of Colorado providing for the adjudication or water rights) it is altogether conclusive that in these proceedings, at least, the intention of the general assembly was to limit the adjudication to ditches irrigating lands situate in this state, and not elsewhere." The inference would seem to be that this right might be protected in the courts of Colorado, if brought before them in some other way. The position of a person diverting water from this same stream in New Mexico for use in New Mexico would not differ from that of the person diverting in Colorado for use in New Mexico. If rights in Colorado were subject to the one, they would be to the other.

In a still more recent Utah case[2] the question here under discussion is directly decided. Deep Creek or Curlew Creek rises in Idaho and flows into Utah. The stream is used for irrigation on both sides of the state line. Action was brought in Idaho, by certain Utah parties, to quiet titles to the waters of the streams, and the court rendered a decree defining the rights of the parties in both states. Later the Utah parties brought an action in their own state, praying for a decree defining their rights in accordance with the decree of the Idaho court. This latter case came to the supreme court of Utah, which held as follows:

> It is insisted on behalf of the respondents that, if this court should hold that the Idaho court was without jurisdiction to enter the decree here sued on, then the Utah parties would have no court to resort to that could protect their property rights, and that the Idaho settlers could with impunity divert the waters from this stream in Idaho, and the Utah parties would be remediless. With this contention we cannot agree. It is a recognized rule of law

[1] Lamson *v.* Vailes, *61 Pac.*, 231.

[2] Conant *v.* Deep Creek and Curlew Valley Irrig. Co., *66 Pac.*, 188.

that a person who has appropriated water at a certain point in a stream is entitled to have so much of the waters of said stream as he has appropriated flow down to him to the point of his diversion; and if the settlers higher up on the stream, in another state, whose appropriations are subsequent, divert any of the waters of the stream which have been so first appropriated, then the courts of the latter state will protect the first settler in his rights. Howell *v.* Johnson (C. C.), *89 Fed.*, 556. The Idaho courts, therefore, have ample and complete jurisdiction to protect the rights of respondents to have the waters which they have appropriated, and which they divert in Utah, flow through the channel of the stream, and to limit and determine the rights of the Idaho appropriators with reference thereto; and by the decree entered in the suit in the district court of Oneida county, Idaho, such rights were fully protected, and may be enforced by proper proceedings in that court. But this rule of law cannot be so extended as to give to the Idaho court jurisdiction to adjudicate and determine the rights, as between themselves, of the several appropriators who divert water from said stream in Utah, and use the same for irrigation upon lands in this state, and to quiet their titles thereto. Such matters are exclusively within the jurisdiction of this state, and, in so far as the decree of the Idaho court attempted to determine and quiet the title to such waters, it was a nullity, and could not form a foundation for this suit.

It appears from the cases cited, which are the only ones yet decided, that suits for the protection of rights in a lower state against diversions in a higher state can be maintained either in the courts of the upper state or in the United States courts for the proper districts.

Two cases are now pending in the United States courts, the most important of which is the suit of the state of Kansas against the state of Colorado. The other, according to newspaper reports, is brought in the United States district court by Wyoming parties using water from Sand creek, one of the headwaters of Laramie river, and flowing from Colorado into Wyoming, to restrain the diversion of the water of the Creek in Colorado, by a canal which has been very recently constructed. The plea in the latter case is that the Wyoming parties were the first users of the water, and are therefore entitled to be protected in that use. This contention is entirely in line with the decision cited above.

The Kansas-Colorado case was brought in the Supreme Court of the United States, as a controversy between states. Briefly, the state of Kansas asked that the state of Colorado be prohibited from allowing any further diversion from the Arkansas river, and from extending the charters of corporation now diverting water from that stream. Colorado's answer related to the question of jurisdiction. In

this contention the court decided in favor of Kansas. The court, in the decision handed down, states the case as follows:

The state of Colorado contends that, as a sovereign and independent state, she is justified, if her geographical situation and material welfare demand it in her judgment, in consuming for beneficial purposes all the waters within her boundaries; and that, as the sources of the Arkansas river are in Colorado, she may absolutely and wholly deprive Kansas and her citizens of any use of or share in the waters of that river. She says that she occupies toward the state of Kansas the same position that foreign states occupy toward each other, although she admits that the constitution does not contemplate that controversies between members of the United States may be settled by reprisal or force of arms, and that to secure the orderly adjustment of such differences power was lodged in this court to hear and determine them. The rule of decision, however, it is contended, is the rule which controls foreign and independent states in their relations to each other; that by the law of nations the primary and absolute right of a state is self-preservation; that the improvement of her revenues, arts, agriculture, and commerce are incontrovertible rights of sovereignty; that she has dominion over all things within her territory, including bodies of water, standing or running, within her boundary lines; . . . .

The state of Kansas appeals to the rule of the common law that owners of land on the banks of a river are entitled to the continual flow of the stream, and while she concedes that this rule has been modified in the western states so that flowing water may be appropriated to mining purposes and for the reclamation of arid lands, and the doctrine of prior appropriation obtains, yet she says that the modification has not gone so far as to justify the destruction of the rights of other states and their inhabitants altogether; and that the acts of Congress of 1866 and subsequently, while recognizing the prior appropriation of water as in contravention of the common-law rule as to a continuous flow, have not attempted to recognize it as rightful to that extent. In other words, Kansas contends that Colorado cannot absolutely destroy her rights, and seek some mode of accommodation as between them, while she further insists that she occupies, for reasons given, the position of a prior appropriator herself, if put to that contention as between her and Colorado.

As has been said, the court has jurisdiction and the case is to be tried on its merits. The contention of Colorado that she has the absolute right to do as she pleases with the water in her own state is not upheld by any of the decisions so far rendered, and her own supreme court, when it had the opportunity to announce the principle contended for by Colorado in this case, failed to do so. Kansas, on the other hand, claims an equally exclusive right to have the water of the river flow down to her. Not having full faith in her own contention,

however, she claims that she is the prior appropriator, and is therefore entitled to have the relief prayed for. Under the accepted theory of prior rights, Kansas, as a state, is not entitled to have the diversions in Colorado prohibited, but the individual appropriators in Kansas are entitled to have such appropriations in Colorado as are subsequent to their own restrained, if it is shown that diversions in Colorado actually deprive the earlier Kansas ditches of water. It is claimed by Colorado that even if the water was not used in that state, the ordinary flow of the river would not reach far into Kansas, but would be lost by evaporation and seepage in the broad, sandy bed of the river in eastern Colorado and western Kansas. The court has ordered that evidence as to such practical questions as this be submitted when the case comes up again.

There is urgent need for the settlement of the questions raised in this case. The establishment of the contention of either party would be a great hardship on present irrigators and would be a great hindrance to future development. If the upper state may use the entire water supply originating within its borders, water users in every state in the West except Colorado may be deprived of the supply which has made their settlement possible. On the other hand, if the lower state has a right to the undiminished flow of the streams entering its territory, all future agricultural development in the Rocky Mountain states is precluded. The enforcement of priorities regardless of state lines has behind it the decision of the United States and state courts and the interest of all users of water, present and to come.

RAY P. TEELE.

WASHINGTON.

SOUTH AUSTRALIAN STATE SOCIALISM.

ON the 22d of February, 1894, a special train conveyed a hundred families, in number about 350 persons, to the borough of Morgan, on the Murray river in South Australia, 100 miles from Adelaide. The heads of these families were laborers out of work, and for the most part unacquainted with one another. Only a few had definite social ideals; most came out to escape the misery of the great town, to establish a home in the country, and to find remunerative work. The government of South Australia opened for them a suitable credit account and sent them to Lyrup, where they were assigned tracts of land, which by a law passed in 1893 they were to occupy jointly, until they should have repaid the money advanced by the state. Upon